A BRIEF SKETCH OF THE LIFE OF FRANCIS WHARTON.

BY

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The illustrious editor of the work now given to the public was denied the privilege of seeing more than a fragment of it in print. He died at the moment when he had finished its preparation for the press, and before the proofs of the first volume, as it now stands, had been completed: and it fell to others to supervise the work of publication. This duty was imposed by resolution of Congress upon the present writer, as literary executor of the deceased editor, and has been discharged strictly within the scope of the authority conferred by the resolution. With the exception of clerical corrections in the citation of authorities and in the noting of references, no departures have been made from the editor's manuscript, and it may be said that the work appears as he left it.

As the editor, up to the very hour of his death, was busily engaged upon this his last great task, as if he were trying securely to adjust the capstone upon the monument of legal and historical works which his genius and industry had created, it is appropriate that a place should be given here to a brief account of his life and labors.

Francis Wharton was born in the city of Philadelphia, in the State of Pennsylvania, on the 7th of March, 1820. On his paternal side, he came of a race of men which has given many eminent names to the commerce, the politics, and the bar of his native State. In the early days of the commonwealth his family belonged to the Society of Friends. But his father, Thomas Isaac Wharton, whose mother was Margaret Rawle, the bearer of a patronymic distinguished in the legal annals of the country, left that religious sect early in life to become a captain of infantry in the war of 1812. At the close of the conflict he entered upon the practice of law in Philadelphia, and soon afterwards married Arabella, second daughter of John Griffith, a merchant of that city, son of the Attorney-General of New Jersey of the same name, and brother of William Griffith, a judge of the circuit court of the United States, and author of several legal treatises.* This lady is said to have been distinguished for great loveliness of character, a fine poetic fancy, and a rare power of felicitous expression.

As a lawyer, Thomas Isaac Wharton was remarkably successful, but he also exhibited strong literary instincts. In his earlier days he con-

* Memoir of Dr. Francis Wharton: Philadelphia, 1891.

tributed to the "Portfolio" under Dennie's management, and was subsequently one of the editors of the "Analectic Magazine." Later, when he had devoted himself more strictly to legal studies, he, in connection with others, was employed upon the preparation of a dratt of a code of the civil statutes of Pennsylvania. He was also the editor of the first edition of Wharton's (Penna.) Digest, and of the six volumes of Wharton's Reports.

At the age of seventeen Francis Wharton was entered as a student at Yale College. In 1839 he was graduated; and he then returned to Philadelphia, and became a student of law in his father's office. In 1843 he was admitted to the bar. While a student of law he wrote constantly for the periodicals of the day, and contributed many articles to "Hunt's Merchants' Magazine." This literary habit clung to him after he had entered upon the practice of his profession, though his success at the bar was rapid. He edited for a time the "North American and United States Gazette," and subsequently, while still engaged in the practice of the law, the "Episcopal Recorder." He also participated in political affairs as a strenuous supporter of the Democratic party, and when John K. Kane was Attorney-General of Pennsylvania was one of his assistants. It was in this position that he was first led to write on the criminal law and to the composition of practical legal treatises.

In 1854 there came a turning point in his career. Two years previously he had married Miss Sydney Paul, daughter of Comegys Paul, of Philadelphia, and her death in September, 1854, resulting in the breaking up of his home, seems to have quickened and confirmed the inclination he had long exhibited for charitable and religious occupations. It is said that while a student of law he desired to become a clergyman, but was dissuaded by his father. But twelve years after his admission to the bar he finally abandoned the active duties of a legal practitioner, and became a teacher chiefly on theological topics. In 1856 he made a tour through the West, distributing Bibles and tracts, and during this journey visited Kenyon College (connected with which is a theological seminary), at Gambier, Ohio. Here he was induced to accept a professorship, and while he lectured on English history and literature and on constitutional law, he entered deeply into the religious life of the place and delivered discourses on theological subjects. A part of these may be found in a book entitled "Modern Theism," which contains a series of lectures delivered by him to the students on "Modern Infidelity."

In 1859 Dr. Wharton paid his first visit to Europe, and after his return was married, on December 27, 1860, to the daughter of Lewis R. Ashurst, of Philadelphia. In 1862 he fulfilled his long-cherished desire to enter the ministry of the Episcopal Church. He was ordained a deacon at Cleveland, Ohio, and a month later received priest's orders. The first parish to which he was called was that of St. Paul's, at Brookline, Mass., whither he went in 1863. After six years of successful

labor in this place he went to Europe for a second time, and while there completed his work on the "Conflict of Laws," which bore evidence of a reviving interest in purely legal studies, which he had never entirely abandoned. From this period on he devoted more and more of his time to the composition of works on legal topics.

On his return from Europe Dr. Wharton, finding that an old affection of the throat incapacitated him from preaching, resigned his parish and accepted a professorship in the Seminary of the Episcopal Church at Cambridge, where he lectured, among other things, on Ecclesiastical Polity and Canon Law. At the same time he delivered lectures at the Boston University on the Conflict of Laws. While thus busily engaged as a teacher he produced in rapid succession works on Negligence, Agency, and Evidence. But the stress of his many occupations and the sedentary mode of life which they necessitated were too wearing, and the physical weakness, especially in the throat and heart, which they engendered, compelled him in 1881 to give up lecturing and go again to Europe. He remained abroad till the spring of 1883, when he returned to the United States and established his home in his native city of Philadelphia, intending to devote himself for the future to his legal publications. This plan, however, was soon altogether changed.

Early in the year 1885 Dr. Wharton was invited to take the post of Examiner of Claims, or Solicitor, for the Department of State, at Washington. After due reflection he accepted the position, and late in March entered upon the performance of its duties.

It would be difficult to conceive of greater fitness of person for place than that of Dr. Wharton for the office to which he was called. Although he left the bar for the church early in life, the impress of his legal training remained and his predilection for the law never forsook him. Whatever might be the subject that occupied his attention, it was to its legal aspects that he was especially attracted. His mind was singularly versatile, and his sympathies were broad and easily touched. He possessed, besides, a strong vein of sentiment, which not infrequently had a controlling effect upon his conduct. He was fond of poetry, and sought diversion and recreation in works of fiction. Endowed with such generous tastes and faculties, technical disputations were little to his liking. The narrow view of a question never appealed to him. It was in the discussion and application of broad and general principles that he found his greatest delight, and it was in the natural development of this liberal disposition that the lawyer became the eminent and accomplished student of jurisprudence.

In addition to his knowledge of law, Dr. Wharton possessed an extensive acquaintance with history. He was accustomed to say that Englishmen knew less than Americans of English history, and if he was to be taken as an example of his countrymen his observation was certainly correct. His knowledge of the history of England was singularly thorough and minute. It was not confined to the leading inci-

dents which are stated in the formal histories, but extended to the lives, the letters, and the minor accounts of men and women. With the exception of the history of the United States, he knew more thoroughly that of England than of any other country: but he was also a diligent student of history, both ancient and modern, in the most general sense. What he read he was enabled to retain by the possession of an unusual memory. He made few notes and kept no common place books, and did not burden his mind with useless dates and facts. His memory was philosophical rather than circumstantial. If questioned in respect to a particular circumstance, he often expressed an inability to answer. But, if called upon to consider a particular subject, he was able, with a rapidity and completeness seldom witnessed, to draw from the stores of his memory a copious supply of historical illustrations and analogies.

The labors of Dr. Wharton in history and jurisprudence and his fondness for the discussion of general principles led him to the study of international law, and prepared the way for his eminence as a publicist. His first important achievement in this field is found in his treatise on the "Conflict of Laws," or "Private International Law," which includes a comparative view of Anglo-American, Roman, German, and French jurisprudence. Concerning this work, an intelligent and discriminating critic in the "Southern Law Review" expressed the opinion that upon it would rest its author's lasting and solid fame. There is reason to believe that Dr. Wharton shared this opinion, for he took an evident pride in the book, and often referred to the criticism in the "Southern Law Review" as one of the most appreciative and satisfactory ever written upon any of his works. In 1885 appeared his "Commentaries on Law," which embrace chapters on international law, both public and private.

Such was the preparation of Dr. Wharton for the discharge of his new duties. Learned both in history and in jurisprudence, and with a wide and established reputation as a publicist, he was able to speak as one having authority. He was not compelled to search for principles and precedents; he had already reduced them to possession, and it was only necessary for him to apply them. The value of such a preparation can be estimated only when we consider the distinctive character of international law as a branch of jurisprudence. The average practitioner, trained in the strict school of the common law and accustomed to the technical disputations of the ordinary judicial courts, finds himself, when called upon to deal with matters involving international law, confronted with a new type of questions, in the solution of which his previous education affords him little assistance. In reality one of his first tasks will be to rid his mind, so far as he may be able, of its prepossession for technical reasoning. The books which he has been accustomed to consult, with a view to obtain a "case in point," can no longer be accepted as guides. Even if he should find in the courts of his own country a decision upon the question which he has under con-

sideration, he would then be required to ascertain whether that decision had been accepted as being in accordance with the principles of international law; for in such matters one nation is not bound to accept as conclusive the decisions of the courts of another. He would then find it necessary to embark upon the study of history and the works of publicists, and to apply with such guides the principles of reason and justice. Although in this department of learning the United States can claim such distinguished names as those of Wheaton, Story, Kent, Lawrence, Field, and Wharton, the study of international law has for the most part been neglected in this country. When the subject is taught in the schools, the course of instruction is usually confined to a few lectures of a more or less perfunctory character, and perhaps to a few lessons from text-books which deal with the most elementary doctrines. No attempt is made to trace the history of the subject, and the remarkable contribution of the Government of the United States to its progressive development is almost wholly overlooked. A gentleman not long since in the diplomatic service of the United States recently told the writer that one of the most distinguished publicists of Europe declared to him that he found more to interest and instruct him in the annual volume of the Foreign Relations of the United States than in any other current publication on international subjects. This, he said, was due to the freedom and originality with which questions were treated; a circumstance in large measure attributable to the unique position of the United States in the family of nations.

Dr. Wharton entered upon the discharge of his duties in the Department of State with all his accustomed energy and enthusiasm, and for a time found ample occupation in the daily work of his office. Coming into the place soon after a change of administration, he was required to give opinions upon a large number of complaints which had in the interval been submitted to the Department with a view to their diplomatic presentation to foreign governments. This influx of claims attends every change of administration without reference to its political character. The principle of *res judicata*, though not infrequently invoked, is not applied with the same strictness in the executive departments as in the courts; and each suitor whose claim may have been the subject of an adverse decision finds room to hope that in the change of the head of the department his complaint may receive favorable consideration. In the first year of his official life Dr. Wharton gave formal written opinions upon 221 claims involving various questions of law. But his labors were not in the mean time restricted to the examination of claims. Questions of international policy were also the subject of his consideration. In the spring of 1885 the Colombian Government, with a view to suppress an insurrection which had arisen in that country, issued two decrees of great importance to foreign nations. By the first of these decrees, certain ports then in the possession of the insurgents were declared to be closed to foreign commerce; and the

penalties and forfeitures affixed by Colombian law to smuggling were denounced against the goods which might be imported into or exported from those ports, and against the vessels which might engage in trade with them. By the second decree it was declared that the vessels which, under the flag of Colombia, were then employed by the insurgents in hostile foreign commerce with that port did not belong to the Colombian Government, and had no right to fly the Colombian flag; and for these reasons they were declared to be beyond the pale of international law, and their repression by the armed forces of friendly powers was invited. These decrees raised two questions, on which Dr. Wharton always held and expressed very decided views—the rights of neutrals and the international status of insurgents. The United States refused to treat the decrees as sustainable on principles of international law. The right of a government to close, by a decree, ports not in its possession, not actually blockaded, was denied. At the same time the Colombian minister was informed that the United States would not treat the vessels of the insurgents as pirates. It is not improper to say that Dr. Wharton materially contributed, by his learning and skill, to the argument made by the United States on that occasion.

Before the close of his first year in the Department of State Dr. Wharton began the compilation of a digest of the opinions and decisions of executive and judicial officers of the United States on questions of international law, with legal and historical notes. The work being too large and scarcely popular enough in character to be undertaken by a private publisher, its printing was provided for by a resolution of Congress. An intelligent critic has recently observed that if Dr. Wharton had done nothing else during his industrious life for the science of jurisprudence, the "International Law Digest" would, quite apart from his labors in the field of criminal law and of the conflict of laws, be his enduring monument. Such defects as the work possesses are inherent in its character. It was drawn not only from published documents, but also from the unpublished records of the Department of State, beginning at the origin of the Government. In dealing with the latter it was necessary, owing to the number of subjects treated and the voluminous character of the discussions, to omit a great deal, and to select such parts as were deemed illustrative of the doctrines most consistently maintained. Such a process of selection necessarily reflects in some degree an editor's personal bias. But the "International Law Digest" remains a monument to its compiler's learning and industry, and is full of interest and instruction. The first edition was soon distributed, and in 1887, by direction of Congress, a second edition was printed.

After the publication of this work Dr. Wharton undertook the labor of editing the "Diplomatic Correspondence of the American Revolution." Provision for printing was again made by Congress, and he worked at his new task incessantly up to the date of his death. Only

a few days before that event he received and corrected some proofs of the first volume.

This brief outline of the life of Dr. Wharton during the period of less than four years which he spent in the Department of State presents a record of unusual character. The activity of his mind was incessant, and he wrote with rapidity; but, with all his learning and all his facility, it would have been impossible to accomplish in the short space of four years the immense and varied tasks he undertook, if, in addition to his other qualities, he had not possessed that of untiring industry. "Dogged industry" was the term which he liked to apply to his habit of labor. His capacity for work seemed to be almost unlimited, and he was never idle. He rose early in the morning, usually about 6 o'clock, and immediately resumed his tasks. His labors the days could not be said to divide; for he gave few hours to sleep, seldom more than five, and often less, and the first hours of the morning generally found him still at work. Sometimes he went out early to walk, in order to refresh himself for the day's labor; and this was about the only physical exercise he took. He usually reached his office before 9 o'clock, and then worked through the day without intermission. He not only worked constantly, but also eagerly, in order to accomplish as soon as possible the task he had set. He possessed in the highest degree vivacity of intellect. This quality imparted to the severest labor keen and apparent pleasure, and contributed to sustain his exertions. He was also able to perceive at a glance any pertinency in what he read to the subject under consideration. In this way he was able to read with great rapidity. He possessed little fondness for books for their own sake. They were merely his instruments. He valued them solely for what he could obtain from them, and, after extracting what suited his purpose, put them aside. He was not what we style a book lover. Hence, as he lived for the most part in close proximity to large public libraries, he collected few books, and his private library, which was comparatively small, was not selected with reference to his work. His quickness of perception and his ability to appreciate at its relative value whatever came under his notice enabled him to employ with unusual ease the labors of others. Moreover, he understood so thoroughly and so comprehensively the subjects on which he wrote, that, in directing and utilizing the labors of others, he was able to give to each thing its proper place and its appropriate effect. Thus he was not compelled to complete one branch of an argument before he proceeded to another. Keeping the whole in his mind, he was able to pass from one part to another, and, where vacant places were left, to fill them up as his collection of materials was completed.

Dr. Wharton's capacity for productive labor can not be more forcibly shown than by an enumeration of his principal works. His first reputation as a legal author was made by his writings on criminal law. His works on this subject are four in number, and comprise treatises on "Criminal Law," "Criminal Pleading and Practice," and "Criminal

Evidence," and two volumes of "Precedents of Indictments and Pleas." The treatise on "Criminal Law" embraces two volumes, and is now in its ninth edition; that on "Criminal Pleading and Practice," in one volume, has passed through an equal number of editions; that on "Criminal Evidence" is in two volumes, and is also in its ninth edition. The "Precedents of Indictments and Pleas," in two volumes, has reached a fourth edition. In conjunction with Dr. Stille he wrote a work on "Medical Jurisprudence," which is also in its fourth edition. He next wrote a commentary on "Agency and Agents," in one volume; then a treatise on the "Law of Negligence," which is also in one volume, and has reached a second edition. Following these came his work on the "Conflict of Laws," also in its second edition; a commentary on the "Law of Evidence," in two volumes, now in its third edition; a work on "Contracts," in two volumes; and "Commentaries on Law," in one volume. Besides these practical treatises, he published a volume of "State Trials," a work full of historical interest, with notes written in a peculiarly charming style, which appeared in 1849, when the author was twenty-nine years of age. The "International Law Digest," to which reference has already been made, comprises three volumes, and the "Diplomatic Correspondence of the Revolution," now appears in six volumes. In order to appreciate the extraordinary facility with which this large number of voluminous works was prepared, it must be remembered that for some years his labors as a writer of treatises on law were suspended, and that all through his life he was a constant contributor to periodicals.

An attempt having been made to describe and explain in a general way the extent of Dr. Warton's achievements as a publicist, it will be interesting to consider more in detail the qualities of his mind, his habits of thought, and the distinguishing traits of his character. Such a combination of faculties as he possessed is seldom witnessed, and it was only after seeing him at his daily tasks that one could appreciate the richness and variety of his mental endowments. Reference has already been made to the quickness and breadth of his comprehension, to his capacity for labor, and to the exceptional character of his memory. It is only by this combination of faculties that we can account for the extent of his acquisitions. No industry, however constant, could have enabled him to accomplish so much if he had not possessed extraordinary mental powers. His works show the extent of his erudition. It was in his treatise on the Conflict of Laws, or Private International Law, that he attempted to cover the widest field of legal investigation. If his acquirements had been wanting either in amplitude or in thoroughness, the defect would then have been revealed. But none of his works was ever received with more instant recognition or with higher approval, not only by the public, but also by scholars and jurists. It did more than any other of his publications to extend his reputation abroad, and no doubt materially contributed to form that high estimate of his learning and abilities which induced the Uni-

versity of Edinburgh to confer upon him the degree of Doctor of Laws, and the Institute of International Law to enroll him as one of its members. For when those honors were conferred upon him the "International Law Digest" had not been written.

Dr. Wharton also possessed powers of imagination of a high order. It is this that distinguishes the narrow logician from the creative thinker. Voltaire said of Dr. Clark that he was a mere reasoning machine. This could never have been said of Dr. Wharton. He did not, indeed, possess that highest type of imagination which has enabled a few men in different ages to create distinctive systems of thought, and to connect their names with new social, political, or legal theories. He made no professsion of originality in this rare sense. He was always ready to avow his obligations to others, and was wont to disclaim any originality of thought. He declared himself to be especially indebted to German writers, whose language he understood and whose works he carefully studied. But he was never the victim of logic. He sought to discover and apply principles, and not merely to find reasons to justify other men's conclusions. He studied and comprehended questions in their wider relations, and not singly and apart. He was especially quick to perceive analogies and reasoned much in that way. This imparted to his discussion of various topics unusual breadth and suggestiveness and exceptional harmoniousness of view.

With his great fondness for history, and his extensive learning, it is not strange that Dr. Wharton should have dealt much in precedents, but he was never the slave of authority. *Stare decisis* was not a rule whose limitative force he felt himself bound to acknowledge. "So it hath been decided" was not enough to silence his objections. That he diligently searched the books for opinions and precedents in order to ascertain what had been determined the wealth of his citations amply shows. He always knew the latest cases. But he never held himself to be precluded from criticising and disapproving what he cited, no matter how high the tribunal from which the expressions came.

Though Dr. Wharton often dissented from the authorities he cited, his opposition was never factious, nor the result of a fondness for disputation. Controversies of a personal character he sedulously avoided, esteeming it a sign of weakness rather than of strength to seek to win a cause by abuse of an adversary. Where he found himself in opposition to the courts, it was because their actions did not square with what he believed to be the reason, the justice, and the philosophy of the matter. When of this conviction, he did not hesitate to dissent and protest. The amplitude of his comprehension enabled him to work out a system of principles in law, politics, and theology with singular clearness and consistency. To those principles he was devotedly attached; and he was always ready to maintain them. The basal principle of his system was that of liberty, and it gave color and direction to all his thoughts.

There was nothing that appealed to him so strongly as the efforts of men and of nations to work out the problem of self government. He never could forget that it was by the exercise of the right of revolution that the people of the United States attained their independence and assumed a place among the nations of the earth. The annals of our early history, the struggles, the vicissitudes, and the triumphs of the makers of the Republic were always the subjects of his especial study and admiration, and to the exposition of the events of that period, and of the causes and course of the conflict, he devoted the last hours of his life. It is often mentioned as the reproach of scholars and men of letters that in the contemplation of abstract themes they lose sight of and cease to appreciate the generous motives which operate upon the conduct of peoples in their struggles for freedom. In the critical study of the acts and character of individuals they become oblivious of their sacrifices and patriotic exertions. It was not so with Dr. Wharton. He had no sympathy with that spirit of detraction which seeks to belittle the beginnings of American history. He was intensely patriotic and intensely American. It was his especial delight to dwell upon the simple life and the simple manners of our Revolutionary period. He was beyond that narrow conception which confounds simplicity with barbarism. It is the tendency of society in every age to consider itself as the best exponent of civilization, and to regard its forms and ceremonies as the embodiment and the test of progress and refinement. This delusion Dr. Wharton did not share. He was sensitive to the conventionalities of life, but he was able to look beneath its shows and ostentation, and estimate its purpose and value. He felt contempt for ignorance and detested bad manners, and neither pretense nor display could conceal them from him or shield them from the shafts of his ridicule. On the other hand, he thought that simplicity of life imparted dignity to character and enhanced the effect of greatness.

It has already been observed that the fundamental principle of Dr. Wharton's system of thought was liberty. He advocated this principle as the beneficent source of all true progress. He believed in free thought, free government, and free seas. His views on all these subjects are fully expounded in his "Commentaries on Law." In law, as governing individual action, he belonged to what he terms the progressive division of the historical school, "holding that the law of a nation is the product of its conscience and need at each particular era." He was equally opposed to the analytical school, of which Bentham and Austin are the chief exponents, which looks to the final settlement of law by a code founded upon the doctrines of utility, and to the theocratic school, which claims for its rules *jure divino* sanction. In opposition to these schools he accepted the arguments of Hooker in his great work on "Ecclesiastical Polity." This work, as Dr. Wharton observed, is unfortunately chiefly known by a single passage containing a sonorous eulogium on law. Almost the only point on which he agreed with

Austin was in thinking that this passage is somewhat rhetorical. Dr. Wharton was accustomed to say that it was the least valuable sentence in the wonderful production in which it is found. According to Hooker, divine law, when applied to men in their mutable relations, and not definitive of dogmatic theology, is also mutable. Much more so, then, must this be true of human law, which is necessarily formulated for the government of men under particular conditions. Referring in his "Commentaries on Law" to Hooker's argument against the theocratic views of the extreme Puritans, Dr. Wharton says: "Two points were taken in the reply of this illustrious thinker, points equally fatal to any system of absolute law: (*a*) Reason and revelation, he maintained, including in revelation whatever law claims *jure divino* sanction, have coördinate authority; reason has to verify the credentials of revelation, then to define its meaning, then to determine its applicability. (*b*) Whatever concerns man in his mutable relations must of itself be mutable; the boat tosses with the wave on which it reposes, the plaster takes the mold of the face on which it is impressed." These views, which are practicable only when reason is left free, Dr. Wharton fully adopted.

But in order that men may be able to work out their destiny in accordance with the dictates of reason there must be free government. On this ground Dr. Wharton advocated the widest liberty of individual action compatible with social order. Law must, he held, in order to be effective, be the emanation of the conscience and needs of the people; but he also maintained that it should impose as little restraint as possible upon the freedom of action of the individual. He was a disciple of Jefferson, and fully accepted the doctrine of *laissez faire*. He rejected the notion that a majority of the people, because they possess the power to rule, have also the right to mold the opinions, and form and regulate the lives of the rest of the community.

In international law Dr. Wharton was a strenuous advocate of liberal principles, and in his exposition of the policy of the United States he laid especial stress upon the importance of preserving the rights of neutrals. Whenever he found a decision either of the executive or of the judiciary which seemed to him to be unduly restrictive of those rights he never failed to combat it. There was one case in particular, arising out of the civil war in the United States, whose authority he never neglected an opportunity to controvert. This was the case of the *Springbok*, in which the Supreme Court of the United States condemned a cargo bound for a neutral (British) port on the ground that it was intended to be transshipped at that port and forwarded on another vessel to a port then under blockade. His most thorough and exhaustive discussion of this case is found in the "International Law Digest." The decision of the Supreme Court not having been accepted by the British Government as being in conformity with the principles of international law, it was brought for examination before the British-Ameri-

can Claims Commission, organized under the treaty of Washington. That tribunal affirmed the correctness of the Supreme Court's decision, notwithstanding the able and convincing arguments against it. Among these Dr. Wharton was wont to refer with especial admiration to that submitted to the Commission by his lifelong friend Mr. Evarts, an argument full of learning and logic, and well worthy the study of anyone who desires to comprehend the principles involved.

It is not a little remarkable that the last published expression of Dr. Wharton's views on law and government should have contained a protest against the doctrine laid down by the Supreme Court and accepted by the Commission in the case of the *Springbok*. In December, 1888, the editor of "The Independent" addressed a letter to a number of eminent men, requesting suggestions as to what changes were needed in the Constitution of the United States in order to bring it "into closer sympathy with the present status of political thought." Dr. Wharton was one of the persons thus addressed, and his reply was published, under the title of "Patches on the Constitution," only a little more than a month before his death. It contains the most comprehensive expression to be found in so small a compass of his opinions on law, politics, and government, and is in every respect so characteristic, both in substance and in style, that with the consent of the editor of "The Independent" it is republished as an appendix to this sketch.

It is proper that something should be said in regard to Dr. Wharton's style. In a review of his "Commentary on the Law of Contracts" a writer in the English "Law Times" said:

> In certain aspects this is a peculiar law book. It is written with more attention to reasonable elegance of style than legal writers usually practise. * * * Full of learning and research, it is not wearisome to read. Matter is never made the slave of form; but, at the same time, the author avoids those awkward and by no means perspicuous attempts at expression, such as "and which," or "that that," which disfigure our text-books and judgments. Lastly, in incidental sentences it will be found that, in estimating the value of principles, the author employs a native originality guided rather than expelled by the process of legal training.

It is a distinctive feature of Dr. Wharton's books that, in addition to their convenience and authority as works of reference, they possess a peculiar literary charm. This is due in large measure to the freshness of his thought and the force and vivacity of his forms of expression. His tendency was to be diffuse rather than concise. He wrote with such facility, and could so easily command words in which to convey his thoughts, that he was little given to condensation; but with all the learning which his works display he never gives the reader the impression that his erudition was a burden to him. He read understandingly, and wrote with a view to elucidate the propositions which he wished to establish. He never consciously or unconsciously sought to impress his views by the employment of that vague and nebulous style of argument by which the reader is sometimes led to mistake mysterious and intangible generalizations for profundity of thought. If he ever

indulged in speculations which could not be reduced to a definite statement, he never attempted to utter them. He often referred in a humorous strain to the mystical productions of writers whose ideas, he said, seemed to have been absorbed by an "inverted perspiration." Dr. Wharton always endeavored to be perspicuous. Occasionally his sentences are somewhat involved and complex in construction, but they are never obscure. They give the impression of having been thrown out fresh from the writer's mind in the vividness and energy of rapid composition. He was much given to the employment of a colloquial or dramatic form of expression, in which the argument is put into the mouth of a person who is supposed to be speaking in an inartificial and familiar way upon the proposition under discussion. Another and constant quality of Dr. Wharton's style is the subdivision of his argument into separate parts, each one of which is pursued and exhausted by itself. The reasons advanced in each part are generally stated in the same distinctive and orderly way. This method he always employed in his books, and the habit clung to him even in his briefer discussions and in his purely historical writings. This analytical method of statement imparted clearness as well as a certain didactic quality to his style. It was by the employment of a multitude of reasons, rather than by the selection and repetition of a single and overwhelming argument, that he sought to establish his proposition. It was the quick succession of blows, rather than the single ponderous shock, that overcame the antagonist.

It is often the fate of writers who contribute in no small degree to mold opinion to be little known except in their books. The life of an industrious writer of treatises on law is necessarily spent more or less in seclusion. He must have time not only for thought, but also for research. Unlike the author of descriptions of life and manners, who acquires his knowledge by contact with men, the writer on law must glean the books for his materials. His writings have little circulation among the mass of the people, and his labors do not reach the popular imagination; hence his personality is generally little inquired about and little known. Dr. Wharton, in large measure, escaped this fate. He was fond of social intercourse. He especially delighted in the society of young men, whose hopeful views and unchilled enthusiasm found a ready response in his own ardent and progressive temper. In mind and in thought he never grew old. In his studies and in his writings he possessed all the energy and vivacity of youth. These traits he carried with him into social life. Wherever a few persons were gathered together for social diversion, and Dr. Wharton made one of them, he was the life of the company. He led in the conversation, and was always sparkling, suggestive, and full of humor. He was a master of playful irony. It required a quick and sympathetic perception to follow and appreciate him, but even those who could thoroughly do neither could not fail to catch the contagion of his lively and spirited manner. At such times his countenance was peculiarly

bright and expressive, and his eyes gave anticipatory flashes of the thoughts he was about to utter. His humor was of a rare quality, and was turbulent and irrepressible. There were few subjects so serious that he could not perceive in them a humorous aspect. One would scarcely look for such things in a work on criminal law; but in his treatises on that subject we find, under the title of "Diversity of Knowledge among Judges," a disquisition on the intoxicant quality of liquors, in which the cases and decisions are discussed both upon principle and upon authority, but with a liveliness and humorousness of manner quite unexpected and entertaining. In the "International Law Digest" we find entertainment and instruction peculiarly combined in the chapter on official and social intercourse of diplomatic agents. The humorous passages found in his serious writings very well illustrate Dr. Wharton's manner in general conversation, and show the ease with which he could apprehend and state arguments.

Early in 1889 Dr. Wharton's physical powers began perceptibly to fail. The affection of the throat with which he had for a long time been troubled to the serious impairment of his voice, assumed an aggravated form, rendering his breathing labored and difficult and the effort to speak injurious. He was fully conscious of the critical features of his condition; but of all those who were concerned in his welfare he himself exhibited the least anxiety. He was always reticent as to his feelings, and rarely referred to the personal incidents of his life; but he was, besides, not afraid to look to the end. By the 1st of February his malady had made such rapid progress that it was thought advisable that he should go to Philadelphia in order that he might undergo examination at the hands of consulting specialists. On the morning of the day on which he undertook the journey he came to his office as usual, in order to look over his correspondence and dispose of any business that might require attention. Although fully aware of his danger, he exhibited no sign of despondency, but rather a quiet determination to face the worst that might come without faltering. The result of the consultation held in Philadelphia was communicated to the writer in a letter so illustrative of the temper and disposition of the sufferer that it is reproduced in this place:

PHILADELPHIA, *February* 4, 1889.

DEAR MR. MOORE: I have been undergoing a thorough examination by a consulting committee of specialists to-day, and they coincide in saying that there are critical features in my case which can only be met by my being confined to my house and chamber for two weeks under a specific treatment. Now, as the disease is purely local, it will greatly amuse me if you will send, as usual, any papers which I can report upon. I will consider this a particular favor. I will also be very glad to see you, but I am positively ordered not to say a word, so do not come unless there is something you can explain to me better by talking than writing. Now be sure to send to me any questions that come up, just as you did before. Please show this note to Mr. Bayard, with my love. I write this in Philadelphia, expecting to return to-night.

Ever yours,

F. W.

Following this letter was a postscript, requesting that a gentleman who was assisting him in the correction of some proof sheets would call upon him at his house immediately after his arrival from Philadelphia.

After his return from Philadelphia Dr. Wharton never left his chamber. The treatment under which he was placed required close confinement and absolute abstention from attempts to speak. For a time it seemed to afford relief, and he was encouraged to hope that he might be out again. It had been suggested that it might be necessary to perform a surgical operation, and the prospect that this might be avoided tended to dissipate his apprehensions. On the 9th of February Dr. Wharton wrote as follows:

DEAR MR. MOORE: Please send down to my carriage a Congressional Register, giving a list of congressmen and our foreign consuls; also twenty or thirty sheets of foolscap Department paper; also my mail, and anything else you may have for me. I am getting decidedly better The Salisbury-Sackville paper is excellent. The assumption that it is for England to determine how far she will interfere in our politics, and that by international law she is to be the exclusive arbiter of this, is intolerable.

My lips are sealed, but I can listen, read, and write all the better.

The document referred to as the "Salisbury-Sackville paper" was the communication which Mr. Bayard, on January 30, 1889, addressed to Mr. Phelps, United States Minister at London, in reply to the note of Lord Salisbury in the Sackville case, in which his Lordship assumed the position that the Government of the United States, instead of dismissing Lord Sackville from the post of British Minister at Washington, was bound to submit the complaints against him to the judgment of his Government, in order that it might decide whether they were of such a character as to require his removal. Dr. Wharton's brief note discloses the activity with which he continued to work; and his observations on the Sackville case show that his interest in current public questions had not abated, and that he was still capable of expressing his views with vigor and clearness.

About the middle of February the symptoms of Dr. Wharton's disease became more unfavorable. He began to experience greater difficulty in respiration, and the necessity of a surgical operation again became imminent. The tone of his communications lost its hopefulness, but he continued steadily at work, chiefly upon the "Diplomatic Correspondence of the Revolution." In a little book entitled the "Silence of Scripture," published in 1867, when he was rector of St. Paul's Church, in Brookline, Mass., he uttered the following thought: "The oars of Providence are muffled. We know not our hour; and hence we are to labor as if we were to live for ever, and trust as if we were to die to night." As we look upon his last days, and observe the unostentatious heroism of his conduct, those words, spoken twenty years before, seem prophetic of his end. A few days prior to his decease the dreaded operation was performed in order to save him from strangulation; but, while the shock weakened his vital forces, he uttered no

complaint and gave no sign of mental distress. He continued at work on some proofs of the present publication, and his corrections betray no evidence of disturbance of thought. He was laboring as if he were "to live for ever," and trusting as if he were "to die to-night." From the calmness of his demeanor one might suppose that he had long lived in the presence of death and had ceased to dread its near approach. The lofty purpose, the dauntless resolution, and the abiding faith which had borne him through the vicissitudes of a life of unremitting effort were never shown with greater clearness than in these last moments. In the presence of death the secret of his life was revealed.

Late at night on the 20th of February, 1889, Dr. Wharton made the first confession of physical weakness which he uttered during his illness. He asked for nourishment and expressed a desire for repose. Then in brief sentences, written on slips of paper—for he could not speak—he bade good night to those who were watching by his bedside and begged them to retire to rest. Soon after midnight on the following morning, as he lay apparently asleep, he was observed to turn his head. He gave no sign of anguish, but at that moment he ceased to breathe.

On the reception of the news of his death the Secretary of State issued the following order:

DEPARTMENT OF STATE,
Washington, February 21, 1889.

Dr. Francis Wharton, the Solicitor of this Department, died early this morning in this city, and his funeral ceremonies will take place on Saturday next, the 23d instant, at 2 o'clock p. m., at his late residence, No. 2013 Hillyer Place.

Such officers of this Department as may desire to attend the funeral will not be required to be present at the Department after the hour of 1 p. m. on that day.

In making this announcement the Secretary of State desires also to place upon the files of the Department a mark of recognition of the public loss sustained by the death of Dr. Wharton, whose eminence as a jurist and remarkable attainments as a scholar are attested by his writings, and have enrolled his name among the most renowned publicists of our time.

His books upon the law remain a monument to his sound learning, wide research, and untiring industry.

Within the circle of those permitted to enjoy his personal companionship his memory will be cherished as a beloved associate, an honorable gentleman, and a sincere Christian.

T. F. BAYARD.

The funeral of Dr. Wharton took place on the 23d of February, and was attended by a large number of his friends. He was buried in Rock Creek Cemetery, near the city of Washington. He left to survive him a widow and two daughters. To attempt to describe the life of a man in the nearest and tenderest of social relations always savors of desecration. From these no hand should seek to remove the veil with which all sensitive natures wish to shield their domestic life from the eye of prurient curiosity. The remembrance of kindness, sympathy, and devotion is the appropriate treasure of those upon whom they are bestowed.

It is in keeping with Dr. Wharton's life that no studied tribute to his character should follow the account of his death and burial. As with him the end of existence was the end of labor, so we may permit the simple recital of what he accomplished to stand as his most fitting eulogy.

October 10, 1891.

[The Independent, January 10, 1889.]

"PATCHES" ON THE CONSTITUTION.

By Francis Wharton, LL. D.

Swift, in the "Tale of a Tub," likened the Christian record to three coats which a father left to his three sons with these injunctions: "Now you are to understand that these coats have two virtues contained in them; *one is, with good wearing they will last you fresh and sound as long as you live; the other is, that they will grow in the same proportion as your bodies, lengthening and widening of themselves so as to always fit.*" It so happened, however, that the oldest of the sons, conceiving that the control of the coats belonged to him, proceeded to cover them with patches of whatever finery the fashion of each succeeding season might make popular, destroying thereby not merely the excellence of their appearance, but their durability and elasticity. They could not be durable if they should have their substance subjected to the fastening on and then the tearing off of successive layers of stuff. They could not be elastic, so as to grow with the body of the wearer, if they were stiffened and clogged by these heavy superincumbent brocades.

Swift's coat, as he thus describes it, is a symbol not merely of the scriptural records, but of all systems which are the products of permanent natural and social conditions. If they are such products, they represent in simplicity these conditions, lasting as long as they last, growing as they grow, and so enduring and adapting themselves because of their very simplicity. Chief among systems of this character is the Constitution of the United States, which is the emanation of such conditions of the people of the United States as are permanent. It provides for the coexistence of Federal and State sovereignties. It provides for the coördination of executive, judiciary, and legislature. It gives the National Government, it gives each department of that Government, certain clearly defined powers, reserving to States and people all powers which are not so assigned. In this way it provides, in case it should not be overlaid with a superstructure of artificial construction, impairing at once its durability and its elasticity, a system of government which, instead of being swept away by new social or

economical developments, receives such developments under its own shelter as part of a harmonious and yet progressive whole.

But the Constitution of the United States, durable and flexible as it is itself, has had its durability threatened and its elasticity diminished by factors not unlike those which Swift allegorized in the "Tale of a Tub." The most potent and mischievous of these factors was the terroristic hyper-conservatism called forth by the French Revolution. Among men of conservative tendencies, among men who distrusted democracy on principle, there was a strong feeling that a general assault on vested rights was at hand, and that they must protect these rights by all available means.

In England, the school that was thus generated was led by Castlereagh, by Perceval, by Eldon, followed by the mass of the aristocracy trembling for their privileges, and by the great body of squires and country gentlemen who were incensed at whatever might disturb their bovine mastery of their own particular fields. By these classes both Houses of Parliament were dominated.

The accession to power in 1801 of the Democratic party prevented the parallel reaction which had begun in America from affecting the executive and legislative departments. But extreme conservatives despaired of the capacity of the Constitution as a barrier to resist the torrent of Jacobinism by which they thought civilization, religion, morality threatened. By Hamilton the fabric was spoken of as "frail and worthless;" by Gouverneur Morris its failure was lamented, but he thought could scarcely be averted. All that could be done would be to prop it up by buttresses and strengthen it by exterior walls, which might make it a fortress in which privileges could be protected, instead of a temple in which liberty was to reign by maintaining the full and harmonious play of State and Federal rights, and by securing to the people the undisturbed enjoyment of business facilities and of political privileges within the respective orbits of state and of nation.

There was one great and courageous statesman and judge, however, who shared the convictions of Hamilton and Morris without sharing their despair, and who, in his position as chief justice of the United States from 1801 to 1835, aided by an unbroken ascendency over his associates, was able to impose on the Constitution constructions which were designed to protect existing institutions and to repel Jacobinical assaults, but which tend to deprive it of much of that elasticity and comprehensiveness on which its durability as well as its utility depend.

Marshall's great moral and intellectual gifts, as well as his capacity as a chief of conservatism in its then supreme conflict with liberalism can be best measured by comparing him with Eldon, who led the same forces in England. Eldon had nothing to do with politics in his court, which, as an equity tribunal, excluded such considerations: but he had a great deal to do with them in the cabinet, in which, as Lord Chancellor, he held a leading position. Marshall had nothing to do

with polities off the bench, but on the bench he dealt with them in the broadest and most effective way, as a large part of the business of his court consisted in settling questions of high constitutional law. Both were men of great political courage; yet Eldon, while prompt and bold in the cabinet, was singularly hesitating and procrastinating on the bench, while Marshall, when in court, never doubted his conclusions, announcing them promptly and emphatically, and with a clearness and simplicity in singular contrast with the turgidity and involution of Eldon's style. Both were consummate managers of men, but Eldon's management was that of the supple courtier, Marshall's that of the majestic chief. Eldon was a tactician, maneuvering for present vantage ground; Marshall a strategist, planning campaigns whose field should be an empire and whose duration an era. Eldon's powers were weakened by his jobbery, his greed, his avarice; Marshall's grandeur was enhanced by his homely simplicity of life, his scorn of jobbery, his indifference to wealth, showing in his own person how little accumulated hoards of money have to do with greatness of the highest type. Both were great lawyers; but while Eldon was far more proficient in the delicate and intricate departments of equity, Marshall surpassed him in the application of common sense to the molding of common law. Eldon's court of chancery, as such, is now swept away, though many of the cardinal doctrines laid down by him in equity are accepted as part of the dominant law of England; and one of the reasons why his court, as such, fell under the ban was the discredit cast on it by his procrastination, his irresolution, and the enormous expense his system of patronage imposed on suitors. Marshall's court is now the strongest and most influential tribunal in the world; and this is, in a large measure, due to the matchless dignity he imparted to it, and the strong, plain, ready sense which his example set for its judgments. And in their political achievements the contrast is still more marked. The result of Eldon's political labors—the black acts, the repressive and bloody legislation as a whole, which his resolute voice had so large a part in forcing through—are now utterly vanished. But the constructions Marshall imposed on the Constitution still remain in greater or less vigor. It has been a great misfortune for the country that some of these constructions have served, like the tags and patches on Swift's coat, to impair seriously the comprehensive simplicity and the paucity of limitation which adapt that great document, as it stands in the original text, to each stage of business or economical development as it arrives. Some of the more damaging of the restrictive "patches" thus imposed I now proceed to consider.

1. Purchase and sale of negotiable paper, loaning money on such paper or on other assets, purchase of goods to meet advances at home or abroad, are matters which can be best arranged and adjusted by the competition of private interests, and which are, therefore, not within the scope of the Constitution of the United States, and can not be

brought within its operation without destroying that very capacity of adaptation to successive epochs which gives it permanency and comprehensiveness. In May, 1781, as a war measure—the war being then at its height and the Treasury insolvent—Congress chartered the first national bank, under the title of the Bank of North America. In February, 1791, when the country had scarcely emerged from the turmoil of the war, when collisions with France and with Spain were threatened, and when Britain still refused to fulfill the stipulations of the treaty of peace, a charter was granted to the first Bank of the United States, with power to discount commercial paper and to issue exchange on deposits of assets. In February, 1816, a charter to the same effect was again granted, as a measure of Government relief, in the suspension of banking operations which the war of 1812 precipitated. This charter, if sustainable at all, was sustainable, as were those of 1781 and 1791, on the ground that a Government bank was necessary to restore to its normal state the currency which the prior war had deranged. But in February, 1819, when credit was restored, trade returned to its natural channel, and the country entering upon a full course of enterprise calling for unfettered business activity, the Supreme Court of the United States, Chief Justice Marshall delivering the opinion, held that, not as a war measure, but as a permanent system of government, Congress could constitutionally put in operation a bank whose functions would include the buying and selling of commercial paper and the issuing of exchange on deposits of all kinds, speculative as well as actual. Of this construction that by which, many years afterwards, it was held within the constitutional power of Congress to force purchasers of goods to take irredeemable paper money in payment, and even to turn gold contracts into paper contracts, was a natural outcome.

2. The determination to protect existing institutions from the supposed enmity of democracy, culminated in the Dartmouth College case, decided in the same term as that which affirmed the constitutionality of the Bank of the United States. Dartmouth College was then existing under a royal charter, which the legislature of New Hampshire undertook to amend. The Supreme Court held that such amendment was inoperative, because a college corporation is a "private" and not a "public" corporation, and because charters of private corporations are contracts, which, under the Constitution of the United States, a State can not lawfully impair. The reasoning of the court brought not merely colleges, but banks, insurance companies, and common carriers, when incorporated, under the head of "private" corporations, so that privileges and immunities and monopolies once granted to them could not be withdrawn. If that decision had remained operative, a charter giving a stage corporation the exclusive perpetual right to convey passengers from point to point would have shut out any other carriers or any other method of carriage forever from the route; a charter empowering them to fix their own rates would make those rates unassailable;

a charter giving the owners of a particular reservoir the exclusive right to supply a city with water would prevent any other water supply, no matter how inadequate such a reservoir should prove. Had this "patch" been unalterably worked into the texture of the Constitution, its life would have been short. "If you persist in your supposed conscientious conviction that you must veto all bills removing religious tests, your majesty's crown," so the Duke of Wellington substantially told George IV, "must fall." The majesty of the Constitution would have been subjected to a like fate if it was held to contain provisions which made perpetual every monopoly, no matter how odious, that had been created in the past.

3. By the law of nations, as construed by the Continental Congress, and in the sense in which the term was used in the Constitution of the United States, freedom of the sea is secured to neutral merchant ships with certain well-defined restrictions. They can not, without peril, after notice, enter a blockaded belligerent port, and they are liable to confiscation if they attempt such entrance. They are subject to be searched at sea for contraband, and such contraband can be confiscated if found on board; but the term contraband is limited to munitions of war destined for belligerent use. Outside of these bounds they are entitled to traverse the high seas without molestation, and they can become carriers for belligerents and for belligerent property, the rule being that free ships make free goods. Over and over again Congress, during the Revolution, affirmed these positions, and a solemn adhesion was given by it to the armed neutrality, which adopted them as the basis of its existence. It was with no slight exultation at the prospect of prosperity that such a system would bring to American shipping that Franklin expatiated on the benignity and wisdom of a policy which discouraged belligerency and encouraged peace, and which would give the hardy seafaring population of America the control of the carrying trade of the world.

But other views were promulgated by England when engaged in her struggle with Napoleon. Her great enemy had from time to time the mastery of the continent of Europe; she must sink unless she obtained the undisputed mastery of the seas. Then there emanated from her courts a series of judgments greatly extending belligerent privileges and greatly diminishing neutral rights. Merely constructive blockades were sanctioned, and, under what was called the doctrine of continuous voyages, it was held that if goods were designed (a question as to which prize courts leaned naturally against neutrals) for blockade-running, they could be seized at any point on the road, though they were to be transshipped at an intermediate port. Contraband was swollen so as to include whatever was of value to the belligerent for whose use it was supposed to be intended. So far from free ships making free goods, enemy's goods were held open to seizure under neutral flags, and neutral ships could be searched for them, and the question of bellig-

erent ownership was, like all other disputed questions, to be left, when the seizure was by a British cruiser, to a British prize court, the fees of whose officers depended in a large measure on making good the capture, and whose prepossessions were all in favor of strengthening belligerent power in favor of Britain, then in a struggle almost for national existence.

We must not look too harshly on the tendency of the Supreme Court of the United States to sustain, though sometimes in faltering tones, those modifications of the law of nations which came across the Atlantic under the great name of Lord Stowell, clothed in the fascinating diction of which that judge was a master, and appealing to the community of feeling which made Americans as well as Englishmen look with aversion at the unscrupulous ambition of Napoleon, which aimed at the subjugation of all civilization to his own rapacious will. England, to many minds, seemed the only bulwark against this lawless Cæsarism on the one side and an equally lawless Jacobinism on the other side; and much as we may be amazed, considering what went before and what came after, at the devotion shown by leading Federalists to England in those dark days, we must be content to acknowledge that this devotion was at that juncture felt by some of the purest and noblest men our country has ever produced. It was not strange then that our Supreme Court should then have receded from the revolutionary doctrine of free seas, and should have in a measure sustained the destructive views introduced by English courts for the purpose of preserving from destruction British maritime supremacy, and with it the cause of revolution itself. Nor was it strange that when we ourselves became belligerents we should accept these doctrines, perilous as they are to neutral maritime rights, as settled law. But it is ground for profound grief as well as amazement that as late as December, 1866, the Supreme Court of the United States, in the famous case of the *Springbok*, should have held that it was good ground to confiscate the cargo of a neutral merchant ship; that the ship, at the time of search and seizure, was on the way to an intermediate neutral port for transshipment to a blockaded port of the enemy, though the seizure was made a thousand miles off from the port of final destination.

When this ruling was made, the civil war, by the judgment of the Supreme Court, had been closed for nearly a year. We were at peace with all the world. Our merchant shipping, it is true, was driven from the seas, but there was every prospect, on the basis of international law, as the Constitution meant it, of our old maritime strength being renewed. *Our* future had neutrality almost indelibly stamped on it, while the future of the Old World was marked by war, which made each sovereignty an armed camp and filled each great port with swift cruisers, ready, in case of conflict, to pounce, not merely on an enemy, but on neutrals who might presume to do any carrying trade on the high seas. With such a prospect before us we deliberately gave away

the opportunity of covering the seas with our merchant service. No wonder the English law officers chuckled with delight at such a surrender on our part, and declined, before the mixed commission after constituted, to impeach the *Springbok* ruling. It made England, already dominant on the seas, master not only of her shipping, but of ours. It would enable her, next time she goes to war with a European foe, to cut matters short, and in addition to blockading her enemy's ports of entrance, to blockade our ports of exit, and to say: "You are the feeders of the enemy—from you come the grain and other staples which nourish him—in addition to enlarging the list of contraband so as to comprehend most stores, I now, in conformity with your own law, as propounded in the *Springbok* case, blockade *your* ports, so as to keep your ships from carrying out anything the enemy might use. *You* blockaded *my* neutral port of Nassau; *I* blockade *your* neutral port of New York." It is not strange that American shipping should languish when under such a ban as this.

Such are among the "patches" which have been woven into our constitutional coat by its guardians, and which, so far as they are permanent, take from it the property which originally belonged to it of growing with our growth. One of these patches, that imposed by the Dartmouth College decision, has been substantially got rid of, partly by overruling by the court itself, partly by constitutional amendments in most States, which preclude granting charters without reservation of power of amendment. The "patch" which assumed to the Federal Government the power to sell exchange, to create illusory currency, and to absorb banking privileges has been removed, so far as it sanctioned a national government bank, by popular action; but it remains in its worst feature in the legal-tender ruling, by which it is held that Congress can, as a permanent peace system, force the reception of irredeemable paper in payment of debts, old as well as new. And the *Springbok* ruling, while repudiated by the executive branch of the Government, still remains unassailed in the records of the judiciary.

The Constitution itself requires no amendment; but what is required is the removal from it of the "patches," impairing its symmetry, its comprehensiveness, its elasticy, and its durability, which have been imposed on it by the judiciary.

DEPARTMENT OF STATE, *Washington, D. C.*